

# LAWS 2017: LAND LAW

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# NATIVE TITLE

## ESTABLISHING NATIVE TITLE

**[Introduction]:** X is asserting native title rights which are interest that constitute a burden to the radical title of the Crown and are determined by reference to the laws and customs practiced by indigenous groups in the area ([57]-[58] in *Mabo (No 2)*). (Note: Recognition grants legal status to Indigenous rights, while extinguishment removes or negates those rights within the Australian legal framework.)

## ENQUIRY 1: RECOGNITION OF NATIVE TITLE

**[Starting point of enquiry]:** For Native title to be recognised, the claimed rights must satisfy the definition of native title rights –

- 1) Native title rights must be owned by a communal group or individual rights and interest of Aboriginal people ( s223(1)) ; *Mabo* [61].)
  - a) *Mabo* – people remain as an identifiable community, the members of whom are identified by one another as members of that community living under its law and customs, communal native title survives (*per Brennan J at para [54] in Mabo (No 2)*)
- 2) Critical Timing: The identifiable community must have existed at the date of colonisation and transmitted laws and customs by traditional means, remaining identifiable as the same society today. This condition of existed at the date of colonisation creates barriers to proving an identifiable community
  - a) **Barrier 1 - distressing process of NT rights to indigenous society:** to prove that they are a communal group would require bringing up their history underpinned by having a colonial government that did not recognize aboriginal protection for the deep and rich connection that indigenous people had to their land, which caused devastating policies of the Stolen Generations caused significant disruptions to family lines and communities. Reliving these experiences can be not only distressing to such a community but Indigenous peoples to navigate a system that often invalidates their own oral histories and knowledge systems, sometimes deterring them from making a claim in the first place.
  - b) **Barrier 2 – use of Genealogy to identify communal group:** Genealogy of early Australia often prioritize colonial perspectives, which can create difficulties for Indigenous peoples making land claims. These records are frequently incomplete and sparse, making it challenging to draw accurate conclusions from the limited facts they contain, especially considering the context of the creation of indigenous communal groups.
- 3) Rights and interest are possesses under traditional laws and customs ( s223(1)(a) NT Act)
  - a) **Barriers: to fully understand the rights indigenous rights and interest:** understanding indigenous rights and interests would need a lot of self-study within aboriginal groups to understand their indigenous knowledge systems which run on different epistemology than western knowledge systems. Western knowledge tends to be analytical, reductionist, and positivist, prioritizing empirical evidence and scientific, mathematical verification, while Indigenous knowledge is often holistic, spiritual connection to the land, built on long-term observation, direct environmental experience, and oral traditions passed down through generations

- b) **Examples:** communal gardens (*Mabo (No 2)*), access and camp on land, engage in ritual and ceremony on land (*WA v Brown* at para [35] per French CJ, Hayne, Kiefel, Gageler and Keane JJ)
- 4) **The traditional laws and customs have connection with the land or waters** ( s233(1)(b) NT Act)
- a) **Need not be a physical connection to the land** but there requires to be a an unbroken chain of continuous connection.
  - b) **Continuous connection test (stringent test)** : There must be a continuous connection to the land from sovereignty until trial ( *Mabo (No 2)*), Brennan J [63].) or that the connection to the land is 'substantially uninterrupted" ( *Yorta*, [89].)
    - i) **Effect if test fails:** If unbroken chain cannot be proved, the foundation of Native Title disappears due to cessation of traditional laws and customs and the NT rights and interest enjoyed are not capable of revival.
    - ii) Applied in *Mabo* the Meriam people maintained their identity as people through continuity of social group and has continued to practice traditional customs in connection to Murray Islands and their laws
    - iii) Applied in *Members of the Yorta Yorta Aboriginal Community v Victoria HCA* case is a key example of "non-recognition" where the claim group people failed to demonstrate substantial continuity as the 'tide of history; has washed away any real acknowledgement of their traditional laws and customs as by 1881 the claimants were no longer in possession of the tribal lands.
      - (1) **Note:** In *Yorta v Yorta* there was strong dissent that the term "traditional" s223 law meant to operate present tense and not historical tense. However, the holding in *Yorta Yorta* indicated the interpretation of tradition in *Yorta Yorta* show cases that it is very strict in what traditional meant indicating that even if the claim group can establish a society, using non-traditional means of transmission can undermine the claim for NT ( *Risk v NT* [2007] FCAFC 46; 240 ALR 75)
- 5) **Rights and interests are recognised by the common law in Australia** ( s233(1)(c) NT Act)
- a) **Limited right and interest:** NO RECOGNITION FOR SEA because the Crown does not have radical title over the sea itself. Native title could only be recognised to the limits of the Crown's rights to the sea which is generally subject to international laws. Accordingly, NT does not include usually extend to rights to the sea. The limits to the rights and interests that NT has been critically termed "berry picking rights" by Noel Pearson, implying a recognition of limited subsistence rights rather than full proprietorship

## ENQUIRY 2: HAS THE RIGHTS BEEN EXTINGUISHED?

**Nature of Native Title:** Native title is described as a *sui generis* right—unique, inalienable, and only surrenderable to the Crown. It is often recognised as a "bundle of rights," rather than a holistic title, and these rights are often 'shared rights' coexisting with other land uses. However, it can be extinguished. Whether native title is extinguished depends on whether there has been a clear and plain intention to do, whether the action be taken by the legislature or by the executive (*Brennan J at para 75 in Mabo (No 2)*).

- 1) **Where Fee Simple is present** : A grant in fee simple is completely and permanently inconsistent with the continued recognition of any native title rights. The case of *Fejo v Northern Territory* (1988) 195 CLR 96 confirmed that a fee simple, once granted, permanently extinguishes native title even if the land later becomes Crown Land. (*WA v Brown* [36]; *Mabo (No2)*, [69].)
- 2) **Where fee simple is absent:** Within its statutory context of the grant and lease, is there a plain and clear intention to extinguish native title? (*Wik Peoples*)

- a) **Land Grant by statute for purposes of mining** is not a fee simple: The court construed the statute the granting of rights to use land for mining, it was for a specific purposes (like pastoralism or mining) without a right to exclude all others is not necessarily inconsistent with, and does not automatically extinguish, native title rights. (*Wik Peoples*). Accordingly, a grant of a licence or lease will not extinguish native title rights and interests unless the lease clearly confers a right of exclusive possession on the exercise (whether expressly or by implication) (*WA v Brown*)
  - b) **Partial Extinguishment and Co-existence:** Not all grants or statutory rights result in total extinguishment. If inconsistency is identified, native title is extinguished to the extent of the inconsistency (*Mabo* [38],[39].)
    - i) Applied in *The Wik People v Queensland (1996)* decision was pivotal, determining that pastoral leases in Queensland did not necessarily confer exclusive possession and therefore did not totally extinguish native title, allowing for co-existence where the rights were not inconsistent. The inconsistency must be with the *rights* granted, not merely the *use*.
    - ii) Applied in *WA v Brown*: it was found that rights granted by the mining leases were not inconsistent with the claimed native title rights as the mineral leases did not confer the right to exclusive possession, but rather the right to go on the land and remove the iron ore only. [43]. Further, native title holders could have exercised all the rights that now are claimed anywhere on the land without any breach of any right which had been granted to joint ventures and the claimed native title rights and interest [57]
- 3) **Limiting the amount of extinguishment:** The *Racial Discrimination Act 1975* (RDA) played a critical role in limiting extinguishment. In *Mabo No. 1 (1988)*, the High Court found that the *Queensland Coast Islands Declaratory Act (1985)*, which purported to extinguish Meriam people's rights without compensation, was invalid because it conflicted with s10 of the RDA.
- a) **Disregarded Extinguishment:** In certain circumstances, extinguishment can be "disregarded" under the NTA (ss47, 47A, 47B). For example, where the area claimed is held under a pastoral lease by native title claim group members or is vacant Crown land occupied by them. Hence, it is clear that such provisions were introduced to alleviate the effects of extinguishment
  - b) **Compensation for extinguishment :** The NTA s51, s51A and s53 provides for compensation on "just terms" for the loss, diminution, impairment, or other effect of acts on native title rights and interests. The *Northern Territory v Griffiths HCA* case at Timber Creek demonstrated that compensation can include substantial sums for "non-economic value," recognising the hurt and shame of being unable to protect sites and the impact on cultural life through the basis of just terms in s51(xxxi). This is critical especially where the traditional value of the lands have a misalignment with the dollar value.
- 4) **Limits of extinguishment: Critical Timing of RDA**
- a) **Critical Date 30 October 1975 :** Any grants before the RDA which came in force 30 October 1975 would not be protected from uncompensated extinguishment. Under the Native Title Act 1993 (NTA), an interest conferring a right of exclusive possession (other than a mining lease) is categorised as a "previous exclusive possession act" (PEPA) This is a barrier to NT recognition .
  - b) Applied in *Wilson v Anderson* decision signifies that if their claim area is covered by a previous exclusive possession act that confers exclusive possession, **native title cannot be recognised** in that area *where the court* considered leases granted under the *Western Lands Act 1901* (NSW). The High Court held that these perpetual grazing leases, despite having some features of

determinable fee simple, granted a right of exclusive possession and thus extinguished native title under s23B(2)(c)(viii) of the NTA.

### ENQUIRY 3: DETERMINATION OF NATIVE TITLE

S225 operates after a claim has been made and is being considered by the Federal Court. It sets out the specific content of a "**determination of native title**," which is the formal legal order or judgment the Court makes.

- 1) **Process includes Negotiation and agreed determinations**
  - a) A special procedure needs to be available for the just and proper ascertainment of native title rights and interests which will ensure that, if possible, this is done by conciliation and, if not, in a manner that has due regard to their unique character
  - b) **Criticism / weaknesses:** The process of achieving a native title determination can be "long, often unnecessarily", requiring extensive evidence from anthropologists, historians, and genealogists, and complex negotiations.
- 2) **If exclusive or non-exclusive rights are orders, it is held on trust by Registered Native Title Body Corporate (RNTBC).**
  - a) RNTBC has the authority to enter into agreements that affect native title such as **Indigenous land use agreements (ILUAs)**
    - i) **What are ILUAs?** they have effect as a contract that binds all persons who might hold native title whether or not they were parties (s24EA). They may be about a wide range of matters, including extinguishing native title, authorizing future acts, or dealing with the relationship between native title and third party rights.
    - ii) **Economic Opportunities:** ILUAs can be used to negotiate a wide range of economic benefits through **financial compensation:** Payments for the use of land for projects like mining, infrastructure, or other commercial developments.
    - iii) **Greater Control and Self-Determination:** By entering into an ILUA, Indigenous groups have a direct say in how their traditional lands and waters are managed.
  - b) **Criticism / weaknesses:** RNTBCs have limited funds available unless the RNTBC has access to an income stream from future act agreements. Therefore, they do not have a strong revenue base to sustain their administration.

## EXCEPTIONS TO INDEFEASIBILITY

### WHAT IS INDEFEASIBILITY?

**[Introduction]:** [insert *Torrens title land name*] is Torrens title land, **X will acquire title by registration, not registration of title: *Breskvar v Wall* (1971) (Barwick CJ, 385).** Accordingly, no dealing **UNTIL registered** shall be effective in passing any estate or interest in land (**s 41 RPA**). Given that [X] on the facts [has/has not] registered the Torrens Title land, he has acquired a legal interest, and indefeasible title over the land. The manual folio to be considered evidence of title, and that the land has been duly brought under the Act (**s 41 RPA**). Nevertheless, on the facts it appears that **[NAME THE EXCEPTION APPLIES]** which could defeat indefeasibility of [X] who has registered legal interest in [*Torrens title land name*].

## EXCEPTION 1: REGISTERED PROPRIETOR PARAMOUNT, SUBJECT TO OTHER REGISTERED PROPRIETORS

**[Introduction]:** As per s42 RPA, [X] is the registered proprietor for the time being of any estate or interest in land recorded in a folio of the Register shall be recognised. However, this is subject to other registered interests, with title to the land. Accordingly, Purchaser [Y] of [Torrens Title Land] from the registered proprietor [X]. On the facts, [Z] has a registered [easement/ leasehold] interest.

- 1) If [Z]'s interest states registration number of dealing and identifies interest, Purchase [Y]'s title is not indefeasible with respect to [Z]'s interest
  - a) **Reasoning:** Similar to the case of *Bursill Enterprises*, if Purchaser [Y] was prudent purchaser, he/she would have encountered the reference on the folio and would inspect the transfer to ascertain the nature of the rights it conferred. (*Bursill Enterprises Pty Ltd v Berger Bros*, [79].)
    - i) Applied in *Bursill Enterprises Pty Ltd v Berger Bros Trading Co Pty Ltd (1971)*: held that the transfer of a fee simple interest in that airspace was sufficiently "notified" to bind later registered proprietors the folio states the registration number of the dealing creating it and identifies the interest. On inspecting the transfer, the purchaser would discover that airspace had been transferred
    - ii) Applied in *Mercantile Credits v Shell Corporation*: held that the option to renew was contained in the registered lease and hence, Mercantile credits indefeasibility was subject to the registered option to renew lease.
    - iii) **[Registered option to purchase? ]:** An option to purchase, unlike an option to renew a lease, is generally considered a separate and personal right, not an integral part of the leasehold interest itself. This is because it grants the right to acquire a freehold interest, which is fundamentally different from a leasehold. However, in this specific case, the agreement to purchase may be so unique that it was the primary reason the lessee entered the lease. Furthermore, an option to purchase land does confer an equitable interest on the holder. This was affirmed in *Laybutt v Amoco Australia Proprietary Ltd (1974)* at [57], where it was noted that such an option creates an equitable interest in the property itself.
  - b) **Exception:** if interest of [Z] cannot be ascertained from a search of the certificate of title or from a registered instrument referred to in a memorial on the certificate of title. (*Deguisa v Lynn [2020]*, [88])
    - i) *Applied In Deguisa* : The back-cover sheet of the memorandum of encumbrance which was handwritten was only possible to be accessed through the Land Titles office. The court held that the purchaser need not be expected to read documents outside the Register Book or documents that might be found in the Registry Office but not incorporated by an entry on the certificate of title.
- 2) **What is the R-G has given an incorrect interpretation of the?**
  - a) **No effect, Interests determined by instrument itself, not R-G:** An instrument's true import (as determined by the court, if necessary) prevails over the Registrar-General's notification of its import (*Bursill Enterprises Pty Ltd v Berger Bros Trading Co Pty Ltd (1971)*). A purchaser must consider the rights conferred by the instrument itself, and cannot rely on the Registrar-General's interpretation of its effect (*Mercantile Credits Ltd v Shell Co of Australia Ltd (1976)*).

## EXCEPTION 2: FRAUD AND AGENCY

**[Introduction]:** On the facts, RP [X] has engaged in [X's potentially fraudulent]. Per RPA ss42, a registered interest is not indefeasible where the present RP is personally guilty of fraud. (*Frazer v Walker*) There is no comprehensive definition of fraud set to in the RPA other than s3(1) which states that fraud includes fraud involving a fictitious person.

### 1) Is RP's acts fraudulent?

- a) **Fraud is dishonesty of where the knowledge of fraud is brought home to him or his agents** (*Asset Co Ltd v Mere Roihi* [1905] at 210) and requires "moral turpitude" (*Butler v Fairclough* 1917) On the facts, RP has engaged in fraudulent conduct where *[APPLY FACTS: Does RP know or have done anything fraudulent to effect the legal interest of the pf?]*
  - i) Applied in *Asset Co Ltd v Mere Roihi* : PC ruled that there was 'no fraudulent statement made by the company's agents nor any bribery, corruption or dishonesty'
  - ii) Applied in *Efspratiou v Glantschnig* [1972]: Mr G sought to sell a house to Mr E which he had partially held on trust for his wife with the aim of preventing her from receiving benefit. Court held that Mr E was a party to the whole scheme whereby to his knowledge the wife had been deprived of her equitable interest in the land through consideration of FACTORS that Mr E had knowledge of Mr G's fraud and behaved dishonestly in agreeing to go along with the scheme: (1) the speed of the sale (2) the low market price (3) lack of inspection demonstrated
- b) **Fraud Includes wilful blindness:** If suspicions aroused and the person abstained from among inquiries for fear of learning truth, fraud may be ascribed (*Asset Co Ltd v Mere Roihi* [1905] at 210).
  - i) Failure to be more vigilant is not fraud, requires wilful blindness: Applied in *Asset Co Ltd v Mere Roihi* [1905] at 210: The mere fact that Assets Co could have been more vigilant in looking at the allegations of fraud against predecessors was not enough to make out willful Blindness as it was not found that Assets had 'refrained from making inquiries which an honest purchaser would have made'

### 2) Timing of the knowledge of fraud

- a) **Rule: Fraud must be found in the circumstances leading up to the registered proprietor acquiring the registered interest** (*Loke Yew v Port Swettenham Rubber Co Ltd* [1913] at 503-504).
  - i) *Loke Yew* – Port Swettenham was held to have more than a mere knowledge of Loke Yew's unregistered interest as they had made assurances to Eusope to induce Eusope to execute the transfer of the land, which amounted to a deliberate plan to deprive Loke Yew of his interest
  - ii) **However note in light of E-Conveyancing** : this rule in *Loke Yew* may prove difficult with the new E-Conveyancing rules where there will be no registration gap between the dispersal of funds and electronic lodgement of dealings for registration on the Electronic Lodgement Network.
- b) **Exception in personam exception** : Macon CJ and Dawson J in *Bahr v Nicolay* ( No 2) have suggested that post-registration conduct by the registered proprietor may be considered on the issue of whether there is fraud by the RP [see *Bahr v Nicolay*].

### 3) Fraud against whom the **Person who seeks relief**: Fraud must be shown to have been practised against the person who seeks relief to be within the fraud exception in s42 RPA (*Munro v Stuart* (1924))

- a) **Third party with equitable interest in house:**
  - i) Applied in *Efspratiou v Glantschnig* [1972] – the court held that Mrs G could sue Mr E who had agreed to buy the house from RP Mr G as Mr E was party to the scheme where he knew



that that the wife was to be deprived of an equitable interest in the land. The (1) speed of the sale (2) Lower market price (3) lack of inspection demonstrated Mr E had knowledge of dishonesty,

b) RP which have been defrauded can sue Banks for relief where Banks exercise power of sale:

- i) Rule: Generally, a false attestation to signature on a mortgage having been signed in her presence made of an authorised person ( solicitor or bank manager) is held to be a fraud by the bank where there actions of their employees are sheeted home.
  - (1) **Exception: No fraud can be made out if employee/ bank had no moral turpitude:** It will not be enough if some officer of the person who obtains registration without any moral turpitude or intention of depriving a person of an interest in land makes a false attestation (*Russo v Bendigo Bank*, [110].)
  - (2) Applied in *Russo v Bendigo Bank*: , the court held that the false attestation on a mortgage as having signed in her present was made by a clerk employed by a solicitor acting for the bank was not a fraud as the clerk's attestation had shown no element of dishonesty. She gave evidence that she did not know the significance of her attestation in the process of registration
    - (a) Note: For the purposes of a false attestation, it is likely that the knowledge and experience of multiple employees/agents can be aggregated (*Ormiston J in obiter*).
    - (b) Example: *National Commercial Banking Corporation of Australia Ltd v Hedley* (1984) - fraud by the bank where an acting manager had falsely certified mortgagor was signed in his present by a mortgagor, knowing that this was submitted to RG for registration
  - (3) *Applied in Grigic v ANZ Banking group* : the son of the RP had practised signing his father's name and signed his fathers name to a mortgage and had it witness by a bank officer. Father sued the bank for fraud. The court held that the attestation was not statutory fraud as the person who signed the mortgage was not recklessly without caring whether it was signed by RP. [Note the in personam exception also did not apply here].